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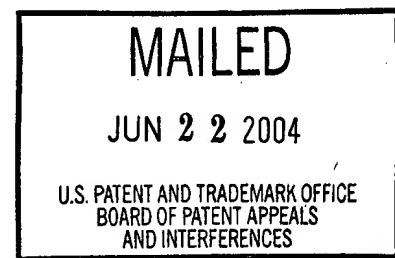
BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

SEP 02 2004
DIRECTOR OFFICE
TECHNOLOGY CENTER 2000

Ex parte SATOSHI HOSHINO

Appeal No. 2003-0438
Application No. 09/252,034

ON BRIEF



Before JERRY SMITH, FLEMING, and NAPPI, Administrative Patent Judges.

NAPPI, Administrative Patent Judge.

Decision on Appeal

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's rejection of claims 8 through 25.

The Invention

The invention relates to a device for detecting a fingerprint. The device detects the fingerprint of a finger that presses on a contact surface, item 6 (see figures 1 and 2). The contact surface moves up or down with pressure from the finger and springs, item 7. When the contact surface moves to the predetermined position it engages the locking mechanism, item 8, and actuates switch, item 9. Switch, item 9, sends a signal to a CCD camera to obtain an image of the fingerprint, appellant's specification page 7. The lock mechanism includes a click impression to inform the person pushing on the contact surface whether the pressure of the fingertip is sufficient or not, appellant's specification page 9.

Claim 20 is representative of the appellant's invention.

20. A device for detecting a fingerprint of a fingertip placed on a contact surface that moves up and down and is part of a fingerprint input section, the device comprising:

a moving element opposing downward movement of the contact surface when the contact surface is pressed downward by a fingertip whose fingerprint is to be detected;

a restraint having a detent position at a depressed location of the contact surface and urging the contact surface to remain in the detent position when a first pressure is applied to the contact surface by a fingertip and permitting movement of the contact surface below the detent position when pressure on the contact surface is greater than the first pressure and above the detent position when pressure on the contact surface is less than the first pressure; and

a detecting unit detecting a fingerprint on the contact surface only when the contact surface is in the detent position.

References

Flip	4,025,748	May 24, 1977
Tsikos	4,353,056	Oct. 05, 1982
Murata	4,642,443	Feb. 10, 1987
Itsumi et al. (Itsumi)	5,559,504	Sept. 24, 1996
Heinz Lubke	DE 2952212	Dec. 12 1980
Yasaku	JP 63-5551	Jan. 14, 1988

Rejections at Issue

Claims 8 through 25 stand rejected under 35 U.S.C. § 112, first paragraph, as the specification fails to adequately describe the claimed invention.

Claims 8 and 20-24 stand rejected under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Flip.

Claim 25 stands rejected under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Flip and Murata.

Claims 9,10, 12 through 16 and 18 stand rejected under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Flip and Itsumi et al.

Claims 17, 19 stand rejected under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Flip, Itsumi et al. and Heinz Lubke.

Claim 11 stands rejected under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Flip and Tsikos.

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Opinion

We have carefully considered the subject matter on appeal, the rejections advanced by the examiner and the evidence of obviousness relied upon by the examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, the appellant's arguments set forth in the briefs¹ along with the examiner's rationale in support of the rejections and arguments in rebuttal set forth in the examiner's answer.

With full consideration being given to the subject matter on appeal, the examiner's rejections and the arguments of appellant and examiner, for the reasons stated *infra*, we will affirm the rejection of claims 8 through 25 under 35 U.S.C. § 112, first paragraph and we will reverse the rejections of claims 8 through 25 under 35 U.S.C. § 103.

Analysis

We first consider the rejection based upon 35 U.S.C. § 112, first paragraph. The examiner states on page 3 of the final Office action, dated October 10, 2001, that "[t]here is no disclosure in the specification as originally filed of a restraint having a detent position at a depressed location of the contact surface and that permitting

¹This decision is based upon the appeal brief received June 18, 2002 and the reply brief received Sept 11, 2002.

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movement of the contact surface below the detent position when pressure on the contact surface is greater than the first pressure."

When the scope of a claim has been changed by amendment in such a way as to justify an assertion that it is directed to a different invention than was the original claim, it is proper to inquire whether the newly claimed subject matter was described in the application when filed as the invention of the appellants. *In re Richard Wright*, 866 F.2d 422, 424, 9 USPQ2d 1649, 1651 (Fed. Cir. 1988) (emphasis in original). This is the essence of the description requirement of section 112, first paragraph: whether one skilled in the art, familiar with the practice of the art at the time of the filing date, could reasonably have found the "later" claimed invention in the specification as filed. *See Texas Instruments Inc. v. U.S. International Trade Commission*, 871 F.2d 1054, 1062, 10 USPQ2d 1257, 1262-63 (Fed. Cir. 1989); *Wesphal v. Fawzi*, 666 F.2d 575, 577, 212 USPQ 321, 323 (C.C.P.A 1981). (Amended claims are reviewed to determine if they are supported in the original disclosure under 35 U.S.C. §112, first paragraph. If the amended claim is not supported in the original specification, the claim will be rejected). The test for compliance with 35 U.S.C. §112 requires that the original disclosure provide sufficient information to show that the inventor possessed the invention at the time of the original filing. *Moba B.V. v Diamond Automation Inc.* 66 USPQ2d 1429, 1439 (Fed. Cir. 2003) (citing Vas-Cath, 935 F.2d at 1561) "The possession test requires assessment from the viewpoint of one of skill in the art." *Id.*

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"The description must clearly allow persons of ordinary skill in the art to recognize that [he or she] invented what is claimed." *Id.*

Initially we note that claim 20, the only independent claim before us, was not present in the originally filed application. Claim 20 was added to the application by an amendment dated December 1, 2000 (and amended in an amendment dated December 21, 2001). Thus, the test is whether the subject matter in claim 20 was described in the application when filed. Claim 20 contains the limitation "a restraint having a detent position at a depressed location of the contact surface and urging the contact surface to remain in the detent position when a first pressure is applied to the contact surface by a fingertip and permitting movement of the contact surface below the detent position when pressure on the contact surface is greater than the first pressure and above the detent position when pressure on the contact surface is less than the first pressure." Thus, the scope of claim 20 includes that the contact surface moves above and below the detent position.

Appellant argues, in the paragraph bridging pages 6 and 7 of the brief, that given the sequence of events shown in figures 1 and 2 "one of skill in the art would find it apparent that the contact surface must be able to move below the detent position in order to achieve the goal of reducing pressure variation."

The examiner replies to these arguments on page 6 of the answer stating:

Figs 1 and 2 are not detailed figures to show what Appellant claims. Secondly, the specification on page 8, lines 9-13 clearly recites "when the contact surface 6 is moved downwards until the projected portion 6b faces to the recessed portion 10a, the projected portion 6b and recessed portion 10a are engaged with each other and the contact surface 6 is locked (STEP 304)" (emphasis added). The word "locked" in any dictionary means "fixed in position." Fig. 3 shows step 303 which states "STOPPER PORTION 8 FIXES CONTACT FACE 6" i.e. the surface is fixed in place.

We do not find appellant's argument that "one of ordinary skill in the art would find it apparent that the contact surface must be able to move below the detent position" to be convincing. As stated by the examiner, the appellant's specification on page 8 lines 9-13 identify that the contact surface is locked. Further, we note that page 3 of appellant's specification describes the operation of the device as "... comprising a moving element for moving the contact surface when the fingertip is placed on the contact surface, a lock mechanism for fixing the contact surface when the contact surface is moved to [a] predetermined position." (emphasis added). Also appellant's specification on page 6 describes the operation of the locking mechanism as "holds contact surface 6 at an initial position."² For the forgoing reasons we are not convinced by applicant's argument that figures 1 and 2 or the description of the device suggest to one of ordinary skill in the art that the contact surface moves below the detent position.

² Note we consider the locking mechanism to provide the detent position. Claim 20 refers to the detent position as the position at which the fingerprint is detected. Appellant's specification on page 7 refers to the locking mechanism as providing the "predetermined position" and that an image of the fingerprint is captured when the contact surface is at the predetermined position.

Appellant argues on page 7 of the brief that, "if the contact surface could not move below the detent position, the device would not achieve this goal (of reducing pressure variation) because the user could apply too much pressure with impunity."

The examiner replies, on page 6 of the answer, by referring to the appellant's specification on page 9 which describes that "a click impression or a feeling of engagement from the lock mechanism 8 can inform the user whether the pressure of the fingertip is sufficient or not."

We concur with the examiner, the goal of reducing pressure variations does not suggest to one of ordinary skill in the art that the contact surface moves below the detent position. The appellant's specification identifies that the "click impression" is to provide the user with feedback as to whether the appropriate pressure is applied. We note that page 3, third paragraph of appellant's specification states that "the moving element may comprise an energizing member which withstands movement of the contact surface to make a pressure imposed onto the contact surface substantially uniform until the contact surface is fixed to the predetermined position." We find that this suggests that once the locking device fixes the contact surface, the pressure on the contact surface increases, and that the contact surface does not move after the contact surface is locked. Accordingly, we find that one of ordinary skill in the art would recognize that the feedback from "click impression" is the mechanism to prevent excess pressure from being applied as the locking device will allow pressure to increase.

Appellant argues on page 7 :

Why else does the applicant show in figure 2 that holder 10 extends below the projection 6b when the projection 6b is in the detent position and that there is room for the contact surface to move below the detent position? If the contact surface 6 were not to move below the detent position, why not simply place a stop to prevent further movement (e.g., bending the holder into an L-shape at the detent position or providing a floor). The applicant shows that extension of the holder and the room for further movement because the contact surface does move below the detent position.

The examiner responds to this argument, on pages 7 and 8 of the answer, by asserting that the locking mechanism teaches away from movement of the contact surface below the detent. Additionally, the examiner asserts that movement of the contact surface below the detent could render the device inoperative, thus the absence of a stop mechanism shows that the contact surface is not meant to move below the detent.

We are not convinced by appellant's argument that because figures 1 and 2 show room below the detent position, the contact surface must move below the detent position. This argument, relies upon speculation, and does not provide objective evidence to show that the inventor possessed the invention at the time of the original filing.

Appellant argues, on pages 8 and 9 of the brief, that the examiner's statement that the user stops pushing when the click impression is felt shows that the examiner is miss-interpreting the "click impression" feature of the invention. Appellant argues that

the user of the device must maintain pressure and that if the user stopped pushing the contact surface would rise.

On page 8 of the answer, the examiner states that the click impression informs the user to not push any more and that "it is not true that if the user stopped pushing the contact would rise."

We concur with the appellant that the examiner is incorrect in the statement that the contact will not rise. However, this miss-interpretation, does not impact the examiner's finding that the appellant's specification does not teach that the contact surface travels below the detent position. Appellant's specification on page 6 states, "the contact surface 6 moves upwards when the fingertip is removed from the contact surface 6." Also, appellant's specification on page 7 states " [a]fter leaving the fingertip from (sic) the contact surface 6, the contact surface 6 returns back to the initial state by the restoring force of the energizing member 7." Thus, we find that the contact surface rises when pressure from a finger is removed. However, we do not find that the contact surface's upward movement after removal of pressure to imply that the contact moves down with excessive pressure.

The click impression is described in the appellant's specification page 9, second paragraph. We find that this paragraph teaches that the click impression prevents insufficient and surplus pressure by providing the user of the device a feeling of engagement from the lock mechanism. The user can adjust their fingertip's pushing

power until the click impression is obtained, preventing insufficient pressure. The click impression notifies the user that it is unnecessary to push the contact surface any more, preventing surplus pressure. Thus we find that one of ordinary skill in the art would recognize the click impression provides feedback as to the proper amount of pressure to apply to the device. However, we find no suggestion in the description of the "click impression" which one of ordinary skill in the art would recognize as a disclosure that the contact surface moves below the detent position. Thus, the examiner's miss-interpretation of the feature is harmless error.

In the paragraph bridging pages 9 and 10 of the brief, appellant asserts that the examiner "incorrectly implies that the contact surface is fixed in the detent position and cannot be moved, except upwards." This argument is directed to a statement made by the examiner on page 4 of the office action dated March 4, 2002, where the examiner argues that that the description of the click impression "does not disclose to move the contact surface below the detent position and override the lock mechanism." Appellant argues on page 10 of the brief, that the contact surface is not fixed in the detent position because it must react to pressure applied by the finger to prevent insufficient and surplus pressure. The appellant asserts that the contact surface is not held in the detent position as it is allowed to move freely upward. Finally, appellant states that "since the construction of the holder 10 is symmetrical with respect to up and down movement, one of skill in the art will recognize that the detent position acts the same

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when the contact surface is moving up and down. Nothing is 'overridden' when the surface moves up, and thus there is nothing to 'override' when the surface moves down."

On pages 4 and 5 of the Final Office Action Dated March 4, 2002 the examiner stated:

Nowhere in the specification as originally filed there is a recitation of the contact surface 6 moving below the lock mechanism 8 placed at a predetermined position if too much pressure is applied to the contact surface 6 nor overriding the lock mechanism to move the contact surface below the detent position once it is locked by the lock mechanism.

As stated *supra* we find the statement "movement of the contact surface to make a pressure imposed onto the contact surface substantially uniform until the contact surface is fixed to the predetermined position", suggests that once the contact surface is locked, the reaction of the contact surface to further pushing is increased pressure, not further movement of the contact surface. As stated *supra* we do find that appellant's originally filed specification discloses that the contact surface moves back up when pressure from the finger is removed. Thus, we agree with the appellant's statement that there is symmetry with respect to the contact surface moving down into the detent position and up from the detent position, however we do not find any disclosure or implication that the contact surface moves below the detent position. As stated *supra* we find that one of ordinary skill in the art reviewing the originally filed disclosure would recognize that click impression prevents insufficient and surplus

pressure by providing the user of the device a feeling of engagement from the lock mechanism.

Appellant argues on page 10 of the brief that “[t]he use of the term ‘lock’ in the application does not imply a fixing of position. One of skill in the art reading the entire application will recognize that the “lock” is a guide that provides a self-calibration feature for finger pressure on the contact surface.” Further, on pages 1 and 2 of the reply brief, appellant argues that the examiner has misconstrued the term locked. Appellant states in the reply brief that “applicant intends only one meaning for ‘locked,’ namely that the detent informs the user whether the pressure of the fingertip is sufficient or not where the ‘or not’ includes both too much and too little pressure.”

We find the argument that, lock “does not imply a fixing of a position”, is contrary to the appellant’s specification, which on page 3 states “a lock mechanism for fixing the contact surface.” Also page 6 of the appellant’s specification states the locking mechanism “holds contact surface 6 at an initial position.” We concur with the appellant’s statement that the lock informs the user whether the pressure of the fingertip is sufficient or not. However, we do not find that the “or not” to provide suggestion to one of ordinary skill in the art that the contact surface moves past the detent position (the lock). As stated *supra* we find that one of ordinary skill in the art would recognize that the click impression notifies the user that it is unnecessary to push the contact surface any more, preventing surplus pressure.

On page 10 of the brief, appellant states that the object of the invention is to reduce the pressure variations on the contact surface and as such the device must provide consequences when the pressure is too high. Appellant argues that one of ordinary skill in the art would recognize that the contact surface must move down beyond the detent position and if not there would be no consequence for applying too much pressure and the pressure would not be uniform.

As stated *supra* we find that one of ordinary skill in the art would recognize that click impression prevents insufficient and surplus pressure by providing the user of the device a feeling of engagement from the lock mechanism. We find the original disclosure on page 6, suggests that once the contact surface is locked, the reaction of the contact surface to further pushing is increased pressure, not further movement of the contact surface. Accordingly, we find no disclosure or suggestion in the appellant's originally filed specification of the contact surface moving beyond the detent position.

Finally, on pages 2 and 3 of the reply brief appellant asserts that "most people tend to apply too much pressure, which causes the groves of the fingerprint to collapse" and that "if the Examiner were correct in his assessment of the specification, the user could apply too much pressure and collapse the groves of the fingerprint, which would render the device inoperable."

We do not find this argument convincing as it relies upon speculation and not based upon objective evidence of record.

The examiner bears the initial burden of presenting a **prima facie** case of unpatentability under. *In Re Alton* 37 USPQ2d 1578, 1583 (Fed. Cir. 1996). "Insofar as the written description requirement is concerned, that burden is discharged by 'presenting evidence or reasons why persons skilled in the art would not recognize in the disclosure a description of the invention defined by the claims' *Id.* (citing *In re Werteim* 541 F.2d 257, 263, 191 USPQ 90, 97 (CCPA 1976). The examiner's burden varies deepening on applicant's claims. *Id.* "If the applicant claims embodiments of the invention that are completely outside the scope of the specification, then the examiner or Board need only establish this fact to make out a **prima facie** case." *Id.* "If, on the other hand, the specification contains a description of the claimed invention, albeit not *in ipsis verbis* (in the identical words), then the examiner or the Board, in order to meet the burden of proof, must provide reasons why one of ordinary skill in the art would not consider the description sufficient." *Id.* Once the examiner carries the burden, the burden shifts to the applicant. *Id.* To overcome the rejection the applicant must show that the invention as claimed is adequately described to one of ordinary skill in the art. *Id.* at 1584.

We find that the examiner has made a **prima facie** case for the rejection under 35 U.S.C. § 112. The examiner's rejection, dated October 10, 2001³, on page 2

³ The final Office action dated March 4, 2002 on page 6, states "the grounds for rejection stated in paragraph 4 of the Office Action mailed 10/1/01, paper number 12, are incorporated by reference herein."

identifies that there is no disclosure showing the contact portion below the detent position. We note, that in the arguments discussed *supra*, appellant has not argued or shown that the originally filed specification contains a description of the claimed invention, that is appellant's arguments on pages 6 through 12, discussed *supra*, do not address any section of the originally filed specification that describes the device when the contact surface is below the detent position. Appellant's arguments focus on what one of ordinary skill in the art would find apparent from the originally filed disclosure. Thus, we find that the examiner has made a **prima facie** case and that it is applicant's burden to show that the originally filed disclosure provides an adequate description of the claimed device. For the reasons discussed *supra* we find that the appellant has failed to show that the disclosure provides an adequate written description of the contact surface moving below the detent position. Accordingly, we sustain the examiner's rejection under 35 U.S.C. § 112, first paragraph.

Appellant asserts, on page 8 of the brief, that new figure 7, which shows the contact surface below the detent, is the logical third step to the sequence shown in figures 1 and 2.

We note that figure 7 was disapproved by the examiner and the amendment, dated December 12, 2001 which accompanied the submission of figure 7, was objected to under 35 U.S.C. § 132, see the final office action dated March 4, 2002. Our jurisdiction is limited to the review of rejections of claims and those matters, which at

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least indirectly relate to matters involving those rejections. 35 U.S.C. §§ 7(b) and 134 (1999); **In re Hengehold**, 440 F.2d 1395, 1404, 169 USPQ 473, 480 (CCPA 1971). However, our reviewing court has stated that "the use of § 132 and § 112 was synonymous because 'a rejection of an amended claim under § 132 is equivalent to a rejection under § 112 first paragraph.'" **Moba B.V. v. Diamond Automitation** 66 USPQ2d 1429, 1438 (Fed. Cir. 2003). See also MPEP § 2163.06 ("If both the claims and specification contain new matter either directly or indirectly, and there has been both a rejection and objection by the examiner, the issue becomes appealable"). As such the objection is related to the issue of whether the originally filed disclosure provides objective evidence that the contact surface can move below the detent position. For the reasons stated *supra* we find that the original disclosure does not provide the objective evidence that the contact surface can move below the detent position, accordingly we sustain the examiner's objection to proposed figure 7 and the amendment dated December 12, 2001.

We next consider the rejection of claims 20-24 and 8 under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Filip. In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of establishing a ***prima facie*** case of obviousness. **In re Oetiker**, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). **See also In re Piasecki**, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). The Examiner can satisfy this burden by showing that some objective teaching

in the prior art or knowledge generally available to one of ordinary skill in the art suggests the claimed subject matter. *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Only if this initial burden is met does the burden of coming forward with evidence or argument shift to the Appellants. *Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444. **See also Piasecki**, 745 F.2d at 1472, 223 USPQ at 788.

On page 12 of the brief, appellant argues that the examiner's rejection is "based on the Examiner's interpretation of what the applicant discloses and ignores the limitation that the contact surface moves below the detent position. When this limitation is properly considered, the rejection must fall." Further, on page 13 of the brief, appellant asserts that while the detector in Yasaku can move below the position at which the contact is made, the teaching is not relevant as the claim requires that detecting "only when the contact surface is in the detent position."

On page 9 of the answer the examiner states:

as recited in the specification the switch is an "on" "off" switch to trigger the CCD camera (see Fig. 3, steps 304, 305). There is no disclosure of any sensitivity requirements to both over and under pressure is recited any where in the specification, and the Examiner (sic) position is that any conventional "on" "off" switch would work to trigger the camera."

We disagree with the examiner's assessment. A rejection of under 35 U.S.C § 103 is directed to the claims of the invention, not the disclosure. Independent claim 20 contains the limitation "a detecting unit detecting a fingerprint on the contact surface only when the contact surface is in the detent position." Regardless of whether this

limitation meets the requirements of 35 U.S.C. § 112, a rejection under 35 U.S.C. § 103 must address the limitation. See also M.P.E.P § 2163 III. We do not find any teaching in either Yasaku or Flip that the fingerprint is only detected when the contact surface is in a detent position. Accordingly we will not sustain the examiner's rejection of claims 20 through 24 and 8 under 35 U.S.C. § 103.

Next we consider the rejections of the other dependent claims under 35 U.S.C. § 103. The examiner has rejected claim 25 under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Filip and Murata. The examiner has rejected claims 9, 10, 12 through 16 and 18 under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Filip and Itsumi et al. The examiner has rejected claims 17 and 19 under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Filip, Itsumi et al. and Heinz Lubke. Finally, the examiner has rejected claim 11 under 35 U.S.C. § 103 as being unpatentable over Yasaku in view of Filip and Tsikos. All of these claims ultimately dependent upon claim 20 and as such include the limitation of "a detecting unit detecting a fingerprint on the contact surface only when the contact surface is in the detent position". On pages 8 through 13 of the office action dated October 10, 2001, the examiner relies upon Murata, Itsumi et al., Heinz Lubke and Tsikos to teach a variety of limitations, however the examiner has not shown that any of these references teach the limitation of a detecting unit detecting a fingerprint on the contact surface only when the contact surface is in the detent position. Accordingly, we will not sustain

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the rejections of claims 8 through 19 and 21 through 25 under 35 U.S.C § 103, as they contain the same deficiencies as noted in the rejection of claims 20 under 35 U.S.C § 103.

Only those arguments actually made by appellant have been considered in this decision. Arguments which appellant could have made but chose not to make in the brief or by filing a reply brief have not been considered and are deemed waived by appellant [see 37 CFR § 1.192(a)] Support for this rule has been demonstrated by our reviewing court in *In re Berger* 279 F3d 975, 984, 61 USPQ2d 1523, 1528-1529 (Fed. Cir. 2002) wherein the Federal Circuit Court stated that because the appellant did not contest the merits of the rejections in his brief to the Federal Circuit Court, the issue is waived. *Also see In re Watts* 354 F.3d 1362, 1368, 69 USPQ2d 1453, 1458 (Fed. Cir. 2004).

In view of the forgoing, we sustain the rejection of claims 8 through 25 under 35 U.S.C. § 112 first paragraph and we reverse the rejection of claims 8 through 25 under 35 U.S.C. § 103.

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No time period for taking any subsequent action in connection with this appeal
may be extended under 37 CFR § 1.136(a).

AFFIRMED

Jerry Smith

JERRY SMITH)
Administrative Patent Judge)

Mark R. Fleming

MICHAEL R. FLEMING)
Administrative Patent Judge)

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